

SUPREME COURT OF QUEENSLAND

CITATION: *R v MFC* [2026] QCA 122

PARTIES: **R**
v
MFC
(appellant)

FILE NO/S: CA No 25 of 2025
DC No 268 of 2023

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane – Date of Conviction: 29 January 2025 (Moynihan KC DCJ)

DELIVERED ON: 3 July 2026

DELIVERED AT: Brisbane

HEARING DATE: 30 March 2026

JUDGES: Bond JA, Doyle JA, Henry J

ORDERS: **1. Application for leave to adduce evidence refused.**
2. Appeal dismissed.

CATCHWORDS: CRIMINAL LAW – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW — MISCARRIAGE OF JUSTICE – WHETHER JURY WOULD HAVE RETURNED THE SAME VERDICT – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE — FRESH EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of four counts of indecent treatment of a child under 12 in his care and one count of rape – where the two child complainants were the appellant’s step-grandchildren – where the appeal was made on the grounds of unreasonable verdicts and a miscarriage of justice – whether the verdicts in respect of counts four and five were unreasonable because of an alleged false denial in cross-examination – whether a miscarriage of justice occurred because evidence from the appellant’s wife of an alleged prior inconsistent statement of one of the complainant children was not before the jury – where the appellant’s wife was not called as a witness by the prosecution or defence at trial – whether the evidence from the appellant’s wife is so significant as to justify interference on the grounds of a miscarriage of justice – the difference between fresh evidence and new evidence – whether the verdicts in respect of counts one to three were unreasonable or not supported having regard to the evidence

Criminal Code (Qld), s 668E(1), s 671B
Criminal Practice Rules 1999 (Qld), r 108(1)

Brawn v The King (2025) 99 ALJR 872; [2025] HCA 20, explained
Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26, explained
Lawless v The Queen (1979) 142 CLR 659; [1979] HCA 49, explained
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, explained
R v BEP [2025] QCA 91, explained
R v BEY [2025] QCA 254, explained
R v Condren, ex parte Attorney-General [1991] 1 Qd R 574, cited
R v Daley; ex parte A-G (Qld) [2005] QCA 162, explained
R v HBR [2017] QCA 193, explained
R v Hodges [2019] 1 Qd R 172; [2018] QCA 92, explained
R v Katsidis; ex parte A-G (Qld) [2005] QCA 229, explained
R v Main (1999) 105 A Crim R 412; [1999] QCA 148, cited
R v Roissetter [1984] 1 Qd R 477, cited
R v SDT (2022) 11 QR 556; [2022] QCA 159, explained
R v Spina [2012] QCA 179, cited
R v VI [2013] QCA 218, cited
Ratten v The Queen (1974) 131 CLR 510; [1974] HCA 35, cited
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, distinguished
R v R [1998] QCA 83, explained

COUNSEL: S C Holt KC, with A R Hughes, for the appellant
M A Green for the respondent

SOLICITORS: Smith Cambridge Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **BOND JA:** I agree with the reasons for judgment of Henry J and with the orders proposed by his Honour.
- [2] **DOYLE JA:** I have read and agree with the draft reasons for judgment of Henry J and with the orders proposed by his Honour.
- [3] **HENRY J:** The appellant was convicted by a jury of all counts on an indictment charging five sex offences against his two step-grandchildren, namely:
- (a) indecent treatment of a child under 12 in care, his step-granddaughter KA;
 - (b) indecent treatment of a child under 12 in care, his step-granddaughter KA;
 - (c) indecent treatment of a child under 12 in care, his step-granddaughter KA;
 - (d) indecent treatment of a child under 12 in care, his step-grandson MJ;
 - (e) rape, of his step-grandson MJ.

- [4] The mother of the complainant children used to arrange for the children to spend time in the care of their maternal grandmother and her husband the appellant, sleeping over at their house.
- [5] The prosecution case was that, on one such occasion, during the night, the appellant committed count 4, by touching MJ between the cheeks of his bottom and then count 5, by inserting his penis or something else into MJ's anus. The next evening MJ made a brief disclosure of that episode to his grandmother, i.e. the appellant's wife. On MJ's account his grandmother fetched the appellant who claimed he had only been trying to pull MJ's pants up. MJ later made a disclosure to a family therapist, who had delivered a training session to MJ and other children at his school, resulting in the matter being referred to police.
- [6] MJ's younger sister then disclosed the appellant had touched her sexually too, on about four occasions, when she was alone in the living room with him, and he would call her over to where he sat. One such occasion attracted count 1, an allegation that the appellant touched KA's pubic area. It was alleged on one of the other occasions the appellant committed count 2, by touching KA's pubic area, as well as count 3, by moving her hand to touch his penis.
- [7] The prosecution case turned upon the evidence of the two complainants, each of whom gave credible accounts, which were each cross-admissible in potential support of the other. The circumstances surrounding the progression of their disclosures supported their credit.
- [8] The appellant elected not to give or call evidence, not even from his wife, who refused to provide a statement to the police. No complaint was made at trial, and none is made on appeal, of any error in the learned trial judge's oversight of the trial or summing up.
- [9] The appellant's lawyers, who were not his lawyers at trial, have isolated three grounds of appeal, each of which loses force when considered in the context of the facts and forensic realities of the case. The grounds complain of:
- (a) unreasonable verdicts in respect of counts 4 to 5, because MJ allegedly made a false denial in cross-examination of having lied;
 - (b) a miscarriage of justice, because evidence from the appellant's wife of an allegedly prior inconsistent statement by MJ was not before the jury;
 - (c) unreasonable verdicts in respect of counts 1 to 3, because KA's evidence did not identify objectively distinguishable occasions corresponding to each count.
- [10] There is no substance to any of the grounds and the appeal should be dismissed.

Were the verdicts in respect of counts 4 to 5 unreasonable because MJ made an allegedly false denial in cross-examination of having lied?

- [11] Ground 1 of the appeal is:

The verdicts on Counts 4 and 5 are unreasonable and cannot be supported having regard to the evidence.

- [12] This ground, as argued, was of the unreasonableness of the verdicts in light of a supposedly specific feature of MJ's testimony. That feature was MJ's allegedly false denial of having lied in an answer given at the close of cross-examination during the pre-recording of MJ's evidence. Cross-examination of MJ ended with the following exchange:

DEFENCE COUNSEL: [MJ] I need to say some things to you and if you can just listen very carefully to what I say. What you've said about your pop putting something into your bottom, if I said to you that was a lie, do you agree with that?--- No, I don't.

So what I say to you is that you are lying about that?--- But I'm not.

Okay. And that all that Pop did was pulled your pants up because your bottom was exposed a bit?--- No, he didn't. He said¹ more than that.

And all you felt was his hand coming into contact with your bottom whilst in the process of just pulling your pants up?--- No.

Have you ever told anybody that you have lied about this?--- I did – I never lied about it, so I didn't tell anybody that I lied about it because I haven't.

Did you have a meeting with the Crown yesterday?--- Yes.

Was there another lady there as well, a PACT worker?--- Oh, yes.

Yeah?--- Ah, yes, and there was with the – another lady typing on a laptop.

Did you tell any of those ladies that you had lied about this?--- No, because I didn't lie about it.

Have you told anybody that you lied about it?--- I haven't lied about it so, no, I haven't told anybody. (emphasis added)

- [13] After that exchange there was a pause during which it appears the Crown Prosecutor and defence counsel briefly spoke. Re-examination then followed, with the Crown Prosecutor clarifying that when MJ had come to her office the day before, to be conferenced, he had been with his mother and some other persons. The following exchange then ensued:

CROWN PROSECUTOR: All right. I want you to think back. So I met you yesterday afternoon, and I want you to think back to yesterday morning, all right, before you came?--- Yes.

Did you want to come and see me?--- No.

Did you tell your mum that you didn't want to do anything?--- Yes.

Did you tell her, "I wish I said nothing"?--- Yes.

Did you say, "I wish I had just shut my mouth"?--- Yes.

And that you didn't want to do anything yesterday, which yesterday was today, and then you didn't want to do anything tomorrow, which is today?--- Yes.

¹ Possible transcription error of 'did'.

All right. Did you say at any point that it was all a lie?--- Yes.

All right. Why did you say that?--- Because I was nervous and I didn't want to, like – like – like, because I hated saying – I hated talking about it because it made me very uncomfortable so I just said that to mum because – it was trying to, like, cover up that I was, like, nervous and scared.

Okay. Have you said at any other time that this is all a lie?--- No.
(emphasis added)

- [14] With that, the re-examination concluded and before excusing the witness the learned trial judge checked with defence counsel whether he had questions arising out of that exchange in re-examination. He did not.
- [15] It was open to the jury to infer from the above-quoted passages that when MJ attended upon the Crown Prosecutor for a conference the day before the pre-recording of his evidence, he was nervous, scared and reluctant. It was likewise open to the jury to conclude that he had told his mother he wished he had said nothing and said that it was all a lie, not because it was, but because of a childlike hope of avoiding the unpleasant task of having to give evidence about what his step-grandfather did to him.
- [16] The appellant's counsel in the appeal appeared to accept as much in argument but emphasised there was an added, special significance in what occurred. That supposedly special significance derived from the fact that, on the one hand, MJ lied by denying in cross-examination that he had told anybody he had lied about what his step-grandfather had done to him, and, on the other hand, then acknowledged in re-examination that indeed he had said such a thing to his mother the day before. That acknowledgement, it was submitted, meant he had lied on affirmation in his response in cross-examination. It was submitted such a concession of dishonesty during testimony, on the critical central question of whether his step-grandfather had offended against him, was so especially significant as to mean the verdicts on counts 4 and 5 were unreasonable. The submission, in effect, was that in light of such a concession a jury acting reasonably should inevitably have harboured a reasonable doubt.
- [17] The argument must be rejected for three reasons.
- [18] First, it was open to the jury to conclude that MJ was not being deliberately false when he said he had not told anybody that he lied. In the two instances in cross-examination when he gave an answer to that effect, he in each instance referred to not having lied 'about it'. The effect of what he was saying was that his allegation was truthful, not a lie, and accordingly he would not have told anybody it was a lie. Some people, for example children, may not always grasp the literal reach of questions they are asked. It was open to the jury to conclude that MJ, in giving his response, had not grasped that the literal parameters of the questioning reached beyond the era of disclosure and investigation, with which he would have thought the court was concerned, to include what he told his mother the previous day. It was also open to conclude that to the extent the literal parameters of the questioning extended to the previous day, its literal reach was confusing as to whether it referred to 'ladies' additional to the 'PACT worker' and 'lady typing'. Such views are consistent with the fact that when there were questions in re-examination specifically about what MJ said to his mother the previous day he readily acknowledged having said it was all a lie.

- [19] Secondly, it was open to a jury to conclude that even if, in MJ's answers in cross-examination, he had deliberately omitted reference to the fact that he had told his mother he had lied, it was because he had not meant what he told her when scared about having to give evidence. If that is what occurred, it was open to conclude it was situation specific rather than part of a pattern of selectivity, and thus not as significant a blow to his reliability as the appellant would have it.
- [20] Thirdly, it remained open to the jury to have regarded the broader force of the whole of the evidence as persuasively proving the appellant had acted as alleged by MJ, so as to eliminate any reservations raised by the above discussed feature of MJ's evidence. This is a point of particular importance, not to be obscured by the specific, context free focus of the appellant's argument. The argument may have been confined in its focus, but it was advanced in support of a ground which at law requires an assessment of the sufficiency and quality of the whole of the evidence, to determine whether it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of counts 4 and 5.² It is that assessment to which these reasons now turn.
- [21] From the outset it should be noted the circumstances in which MJ came to be interviewed by police were not redolent of a scheme to target the appellant with a false complaint. Rather, the police were contacted by a family therapist who, having delivered a training session to students including MJ, at MJ's school, was approached by MJ who told him the appellant had touched him inappropriately.
- [22] Further, in the resulting police interview of MJ, there was no hint of vindictiveness in his answers. To the contrary, he was almost apologetic on his step-grandfather's behalf, for example saying of the appellant:
- [H]e was the one that did it 'cause he was on medicine and like, it, it made his brain think funny. He had different intentions 'cause ... He had cancer. He had chemo.
- [23] MJ told the police that, when staying at the home of 'Nan' and 'Pop' as he called his grandmother and the appellant, he was sleeping in his Pop's room downstairs from his grandmother's bedroom. He explained the appellant slept separately from her because of his snoring and the medication he was on. MJ explained that when he had gone to bed he had long pants on and was going to take his underpants off, because he did not like sleeping in them, and he had not pulled his pants all the way up in his half-asleep state. He explained that after he had been sleeping, he felt the appellant's hand or the side of his hand:
- [O]n my butt or in my butt ... and then I woke up and I then felt something bigger and ... then he pushed a bit harder and then I, I just knew and I, I like, wiggled.
- [24] The police sought greater detail and MJ explained:
- I was just sleeping and his hand was like, wettish, and it was like, it was like, that part and like, I heard someone go like, dribble or something and then I felt it on my butt and then he got his hand and that was when it felt like that and then I woke up and then he like,

² *M v The Queen* (1994) 181 CLR 487.

something else felt like, finger-ish, I don't know what it was. It was probably his front part and um, I was just scared and I didn't know what to do and I'm just laying there.

- [25] MJ elaborated further in the police interview, how he had felt the palm of the appellant's hand moving up and down on his butt and had then felt something bigger 'in my butt'. He said:

I think it was like his front part, but I'm not sure. It could've just been his like, it didn't like any of his fingers but I don't know ... And then while it got in, it like, like, hurt a little bit. Um, I wriggled around like, 'cause he pushed harder ... And I wriggled around and um, he stopped and then he got up, but yeah.

- [26] He went on to explain he thought it was the appellant's penis that had penetrated him because it felt bigger than a finger. When asked to explain how he felt it push harder, he said it felt 'heavier' and 'body weight-ish sort of'.

- [27] It was put to and denied by MJ in cross-examination that all the appellant had done was pull up MJ's pants because MJ's 'bottom was exposed a bit'. A jury would well appreciate that MJ's account of what he felt was inconsistent with an accidental touching of his backside, incidental to merely pulling up his pants. In particular, note that MJ referred to the appellant's hand being 'wettish' and to the pressure of penetration. His description was consistent with deliberate sexual interference with and penetration of MJ's anus, not some innocent and misunderstood touching.

- [28] MJ went on to explain that he looked back after the appellant stopped and saw that the appellant was in the toilet and bathroom area. He explained it was about 4 am and he fetched some lemonade, saying it would help his sore tummy. After that he explained:

I said, "Pop, wannna play a game? The first one to go to sleep loses 'cause I was like, scared and I didn't want to just go back to sleep for the same thing to happen. ... So I didn't go to sleep till like, it was light-ish and then... When he was getting up ready to go to work, that's when I had a good sleep.

- [29] Having provided an apparently compelling account of events as he had experienced them, MJ also told the police of how he was to be staying on at the home of the appellant and his wife, the following night. He explained that when they had to go to bed that night he 'felt really scared'. He said he approached his grandmother and said, 'Pop touches me weird like'. He went on to say:

'Nan was crying and saying, "Tell us what happened", and I like, I said a little bit of it but I didn't say the whole thing because I don't want, I, I love him and I don't want him to get into trouble ...'

- [30] MJ explained that he had told his Nan that 'Pop touched me really weird like ... the night before'. He said:

'[S]he like, kept listening and said, "What happened?"', and I said I felt his fingers in my butt and then, um, I just got upset ...'

- [31] He recalled the appellant then came up and there was a conversation between the appellant and his wife. MJ said he was ‘pretty sure they were both crying’. He explained his Nan ‘got angry at’ the appellant who said he had been trying to pull MJ’s pants up. MJ told police of the appellant, ‘he was crying and he was saying he was sorry, but I didn’t say anything I just gave him a hug’.
- [32] Neither the appellant nor his wife gave evidence. The evidence before the jury, and the way it was dealt with by the defence, made it obvious MJ had made a timely disclosure to his grandmother of interference by the appellant with his anus, leading to her raising it with her husband and him claiming, as MJ recalled, that he had only been trying to pull up MJ’s pants. Quite apart from MJ’s evidence, the occurrence of those events was consistent with defence counsel putting to MJ in cross-examination, obviously on instruction, that all the appellant had done was pull up MJ’s pants because MJ’s ‘bottom was exposed a bit’. More significantly, the evidence was consistent with the evidence of MJ’s mother, who testified that she collected MJ and KA the next day, after her mother (MJ’s grandmother) had telephoned her saying something happened to MJ. This was powerful circumstantial evidence in support of MJ’s evidence that he had complained to his grandmother.
- [33] It was thus open to the jury to have concluded that within less than a day of the offending MJ had made a complaint to his grandmother of the appellant having penetrated his anus. The consistency of conduct in complaining, rather than enduring another night in the appellant’s bedroom, supported MJ’s credibility.
- [34] The result is that it was open to the jury to have been satisfied beyond reasonable doubt of the appellant’s guilt of counts 4 and 5.
- [35] The assessment just undertaken considered the evidence of direct relevance to counts 4 and 5. Those counts were indirectly supported by the evidence of MJ’s sister, in that the evidence of the alleged offending against each child was cross-admissible and open to be relied upon by the jury, if it accepted there had been no collusion or concoction, as heightening the probability that the alleged offending against the other child also occurred. The evidence relating to the allegations of MJ’s sister will be considered when considering the ground relating to her account. However, there is nothing in her account which detracts from the force of the evidence already discussed.
- [36] On the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of counts 4 and 5.

Did a miscarriage of justice occur because evidence from the grandmother of an allegedly prior inconsistent statement by MJ was not before the jury?

- [37] Ground three of the appeal is:
- A miscarriage of justice occurred because material exculpatory evidence from [MJ’s grandmother] was not before the jury.
- [38] Rule 108(1) *Criminal Practice Rules 1999* (Qld) requires that a party wanting to adduce evidence at the hearing of the appeal ‘must apply to the court for leave to adduce evidence’. The appellant made such an application, seeking to rely upon the affidavits of MJ’s grandmother and Mr Troy Smith, the appellant’s solicitor, who was not his solicitor at trial. Mr Smith’s affidavit evidenced some records of

communications between the appellant and his solicitor in the lead up to and at the trial. The appellant's argument did not develop reliance upon Mr Smith's affidavit in support of the ground. Its focus was upon the affidavit of the grandmother.

- [39] To remove doubt, while the Crown filed affidavits from the appellant's former lawyers, the Crown explained it did not seek leave to read them because the appellant was not putting competence of defence counsel at trial in issue. As will be seen, there were very good reasons why competent counsel would not have called the grandmother as a witness.

What part of the grandmother's new evidence is said to be so significant as to justify appellate interference on the ground of a miscarriage of justice?

- [40] The appellant's argument focussed upon an allegedly significant fact of which the grandmother could, if called, have given evidence. That fact related to the occasion on the evening after the alleged commission of counts 4 and 5 when MJ had approached and spoken with his grandmother and the appellant then conversed with them. The allegedly newly known fact of significance is that in that conversation, on the grandmother's account:

[The appellant] came up with me to where [MJ] was and said "Hey mate, I'm sorry if I accidentally touched your bum. I was only pulling up your pants".

[MJ] said, "It's okay Pop. I know that's all you were doing".

- [41] The appellant submits this evidence, if known to the jury, would have demonstrated that the appellant immediately gave an innocent explanation and apologised. Yet the jury did know, from MJ's own account of what was said, that the appellant had, in his wife's presence, given the excuse to MJ that he had only been trying to pull up MJ's pants and had apologised. There is therefore no merit in the submission as it relates to that fact. However, the appellant additionally submits that MJ's alleged response, 'I know that's all you were doing', was an acceptance by MJ of there not having been an intentional sexual act and thus a prior inconsistent statement ('the additional fact'). The absence of that additional fact from the evidence before the jury is alleged to have occasioned a miscarriage of justice.

What is the relevant statutory test for receiving additional evidence?

- [42] The statutory test for whether this Court should receive additional evidence in an appeal is found in s 671B *Criminal Code 1899* (Qld), which allows the court to receive the evidence if it thinks it 'necessary or expedient in the interests of justice' to do so. Where the appeal ground sought to be supported complains of a 'miscarriage of justice' per s 668E(1), the questions of whether it is necessary or expedient in the interests of justice to receive such evidence and whether there has been a miscarriage of justice, because the additional evidence was not before the jury, can conveniently be dealt with together.³ That is because if the additional evidence, taken with the evidence at trial, shows there has been such a 'miscarriage of justice', then it will be in the 'interests of justice' to receive it. This has the consequence that the usual tests developed by the courts to decide whether to receive additional evidence in such an appeal are the same as the usual tests for determining whether the additional evidence, taken with the evidence at trial, shows there has been such a 'miscarriage of justice'.

³ *R v Spina* [2012] QCA 179, [34].

Is the evidence 'fresh evidence' or 'new evidence'?

- [43] Where an appellant seeks to rely on evidence additional to that adduced at trial there are said to be two types of such additional evidence: 'fresh evidence' and 'new evidence'. They were explained in the following way by McMurdo P in *R v Katsidis; ex parte Attorney-General (Qld)*:⁴

Australian courts have long recognised a distinction between admitting fresh evidence and new evidence on the hearing of an appeal. Fresh evidence is evidence which either did not exist at the time of trial or which could not then with reasonable diligence have been discovered. New ... evidence is evidence on which a party seeks to rely in an appeal which was available at the trial or which could with reasonable diligence then have been discovered.

- [44] In the present case the grandmother was spoken to by police three days after MJ's disclosure. She told them what happened, apparently being recorded by the police to whom she spoke. However, she did not provide a written police statement and refused to provide one when police tried to obtain it from her prior to the trial. She was available to give evidence at the trial. Indeed, the learned Crown Prosecutor conferenced her on day one of the trial before deciding not to call her as a witness in the Crown case. No complaint is made about that decision. She was nonetheless available to be called as a witness by the appellant had he chosen to do so, indeed she deposed she met the appellant's lawyers on day one of the trial.
- [45] The grandmother deposed that the appellant's lawyers did not take a statement from her, but her evidence of the additional fact, if true, had to have been known to the appellant all along. He would have known of the conversation, because he was a participant in it, and would also have known his wife was present for its occurrence. It was not only evidence which could have been discovered with reasonable diligence; it was evidence which the appellant would have known was actually available at trial. It was thus only new evidence, not fresh evidence.

What is the usual test to apply re new evidence?

- [46] In *Ratten v The Queen*,⁵ Barwick CJ's lead judgment identified different usual tests to apply as between new and fresh evidence, in determining whether a conviction should be quashed on account of a miscarriage of justice because of the absence of the evidence at trial.
- [47] The usual tests emerging from *Ratten* were:

For new evidence: Does the new evidence, taken with the rest of the evidence, show the appellant is innocent or raise a reasonable doubt as to the appellant's guilt?⁶

For fresh evidence: Is the fresh evidence likely to have been accepted by a jury and, if so, is it so cogent as to show that, taken with the rest of the evidence, it was likely to have resulted in an acquittal if it was before the jury?⁷

⁴ [2005] QCA 229, [2] (citations omitted).

⁵ (1974) 131 CLR 510, 518-520.

⁶ *Ratten v The Queen* (1974) 131 CLR 510, 518.

⁷ *Ratten v The Queen* (1974) 131 CLR 510, 518.

[48] The above articulation of the test for new evidence also applies to fresh evidence, in that, as Barwick CJ explained, if it is met then there will have been a miscarriage of justice regardless of whether the evidence is fresh or new.⁸ However, it is simpler for present purposes to cite the second test as the test for fresh evidence because, if the fresh evidence meets that less onerous test, it would in any event meet the more stringent test for new evidence.

[49] The above articulation of the second test, a likelihood test, was modified by the majority in the subsequent High Court case of *Gallagher v The Queen*,⁹ to a significant possibility test, in a form reiterated by Mason CJ in *Mickelberg v The Queen*,¹⁰ namely:

Modified test for fresh evidence: Is there a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial?

[50] That test implicitly retains a need for the fresh evidence to be cogent, because it otherwise would not have the potential to have influenced the jury towards a different result. Minds have differed as to whether there is a material difference between the significant possibility test and the likelihood test.¹¹ In any event, it was the significant possibility test which the majority of the High Court endorsed. Further, that test aligns very closely with the High Court's more recent reasoning in *Brawn v The King*,¹² that, in respect of errors or irregularities which are not fundamental, they will constitute a miscarriage of justice if they could realistically have affected the jury's reasoning to a verdict of guilty.

[51] Applying that reasoning to the modified usual test for fresh evidence it is more correct to use the term 'realistic possibility' instead of 'significant possibility', so that the usual test for fresh evidence has become: Is there a realistic possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial? However, there appears to be no material difference in the meaning intended by the words significant and realistic in the present context and it is convenient in these reasons to continue to use the term 'significant possibility' because the case was argued using that term.

Why is the usual test for new evidence more demanding?

[52] The usual test for new evidence effectively requires it to be shown that the appellant should be acquitted, whereas the usual test for fresh evidence requires only that there is a significant possibility the appellant would have been acquitted. Why is the test for new evidence more demanding?

[53] An appellant who at the time of trial knew or with reasonable diligence should have known of the allegedly material evidence sought to be relied on in the appeal, is differently positioned to an appellant who could not have known of the evidence because it is fresh evidence. The latter has been deprived of a fair trial because of the unavailability at trial of the evidence, despite the reasonable diligence of the defence. The former has not been deprived of a fair trial, having had, but been selective about

⁸ *Ratten v The Queen* (1974) 131 CLR 510, 519-520.

⁹ (1986) 160 CLR 392, 399, 402.

¹⁰ (1989) 167 CLR 259, 273.

¹¹ Eg. *Mickleberg v The Queen* (1989) 167 CLR 259, 301; *R v Main* (1999) 105 A Crim R 412, 416, 418, 420.

¹² (2025) 99 ALJR 872, 876 [9]-[10].

exercising, the opportunity to have gathered and deployed evidence with the potential to have resulted in an acquittal.¹³

- [54] The singular goal of those defending criminal charges is to give the defendant the best chance of being acquitted, but there is not a singular way of pursuing that goal. A variable array of choices must be made, including about what evidence should or should not be sought out for potential use in potential defence of the case and what evidence should or should not be adduced at trial. This invariably involves choices between pursuing different evidentiary paths, each of which may be perceived as providing a significant prospect of achieving an acquittal, with one being preferred over the other as giving the defendant the more significant prospect of acquittal.
- [55] Having made such choices and deployed them at a regularly conducted trial, there will usually be no proper basis to complain to this Court that, having lost, the appellant now wants a second chance to run the trial a different way, using new evidence, unless taken with the rest of the evidence, it shows (per the usual test for new evidence) that the appellant is innocent or that there must at least be a reasonable doubt as to the appellant's guilt.¹⁴ A mere significant possibility that the new evidence may have resulted in acquittal is not enough, because that possibility was present when the defendant nonetheless made the decision at a fair trial to prefer an evidentiary path perceived as providing a more significant prospect of an acquittal. There can be no miscarriage of justice merely because the defence chose an evidentiary path which did not result in an acquittal.

The usual test for new evidence will not always be determinative

- [56] However, there may be a residue of such cases in which some irregularity or other circumstance connected with the absence of the new evidence below is so concerning as to nonetheless cause this Court to conclude there has been a miscarriage of justice because the new evidence was not received at trial. It is sometimes said there is a 'residual discretion' to receive the new evidence in such cases, notwithstanding that the usual test has not been met.¹⁵
- [57] In substance, appellate intervention in those cases is simply a conventional exercise of the Court's power to prevent a miscarriage of justice. As Gibbs CJ put it, in *Gallagher v The Queen*:¹⁶

I would emphasize that no form of words should be regarded as an incantation that will resolve the difficulties of every case. No test can detract from the force of the fundamental principle that the appeal must be allowed if a miscarriage of justice is shown to have occurred.

- [58] Cases in which an appeal court intervenes, despite the new evidence not meeting the usual test of intervention for new evidence, will be exceptional.¹⁷ Were it otherwise, the community interest in the finality of litigation would be undermined,¹⁸ with defendants making the informed strategic choice not to seek out and adduce evidence

¹³ *Ratten v The Queen* (1974) 131 CLR 510, 517; *Lawless v The Queen* (1979) 142 CLR 659, 675.

¹⁴ Eg. *Lawless v The Queen* (1979) 142 CLR 659, 675-676; *R v Katsidis; ex parte Attorney-General (Qld)* [2005] QCA 229, [3].

¹⁵ *R v Condren, ex parte Attorney-General* [1991] Qd R 574, 579.

¹⁶ (1986) 160 CLR 392, 399.

¹⁷ *R v Condren, ex parte Attorney-General* [1991] 1 Qd R 574, 579; *R v VI* [2013] QCA 218, [66]

¹⁸ *R v VI* [2013] QCA 218, [66].

in their defence at a regularly conducted trial, knowing, if convicted, they will be granted a re-trial because the evidence was not adduced.¹⁹

The cited authorities do not support the appellant's argument

[59] The appellant effectively relies upon the court paying lip service to the need for the circumstances of the case to be so concerning as to enliven the potential exercise of the residual discretion. He relies upon some observations in a line of cases to argue that the appropriate test to apply in the present case is whether there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the new evidence been before it at the trial. That argument must be rejected. It invokes the deployment of the usual test for fresh evidence and this case only involves new evidence. That less stringent test may be appropriate in respect of new evidence in those exceptional cases where – despite the usual test for new evidence not being met – it is necessary to invoke the exercise of the residual discretion to prevent a miscarriage of justice. But this is not such a case.

[60] The line of cases relied upon by the appellant begins with *R v HBR*.²⁰ It was an unsuccessful appeal, in which one of the grounds relied upon new evidence to contend there had been a miscarriage of justice. In discussing the significance of the new evidence, Mullins J (as her Honour then was), with whom Gotterson JA and Morrison JA agreed, observed:

The evidence that is now sought to be adduced is therefore evidence that did exist at the time of trial and could have been discovered with reasonable diligence. On that basis, the appellant needs the court to exercise the residual discretion an appellate court has in an exceptional case to receive new or further evidence, where to refuse to do so would result in a miscarriage of justice, in the sense that it can be shown there was a significant possibility that a jury hearing the new evidence would have reached a different verdict on count 1: *R v Katsidis; ex parte Attorney-General (Qld)* [2005] QCA 229 at [3] and [19] and *R v Spina* [2012] QCA 179 at [34] and [42].²¹ (emphasis added)

[61] In that case it was apparently unnecessary to expand upon what circumstances give rise to an exceptional case of the kind in which the residual discretion potentially falls to be exercised. However, in speaking of a ‘significant possibility that a jury hearing the new evidence would have reached a different verdict’, her Honour was expressly doing so in reference to the potential exercise of the ‘residual discretion’. Her Honour was not doing so as if the test of significant possibility is a freestanding usual test for new evidence. It is not. As already explained, it could only arise for new evidence where there has been some concerning circumstance in connection with the absence of the new evidence, taking the case beyond the regular circumstance that the defence made a choice not to seek out and deploy the evidence at a fair trial below.

[62] On one reading of the above passage from *HBR* it is vulnerable to being interpreted as meaning that the significant possibility of a different outcome may of itself provide the basis to invoke the exercise of the residual discretion. That could not have been the intended meaning. The mere fact that new evidence, which fails the usual test for new evidence, may pass the less stringent usual test for fresh evidence, cannot of itself

¹⁹ *Lawless v The Queen* (1979) 142 CLR 659, 675-676.

²⁰ [2017] QCA 193, [83].

²¹ [2017] QCA 193, [83].

provide any logical basis to invoke the exceptional exercise of the residual discretion. That would be to ignore the High Court's reason for imposing a more stringent test for new evidence.

- [63] In *R v Hodges*,²² her Honour's observation was perceived by Philippides JA, with whom Gotterson JA and Daubney J agreed, as wrongly asserting the test of significant possibility is the usual test of miscarriage of justice in respect of new evidence, and thus contrary to High Court authority. In *R v SDT*,²³ McMurdo JA, with whom Morrison JA agreed and Boddice J (as his Honour then was) was in qualified agreement, corrected that perception of what was meant in *HBR*.²⁴ However his Honour may have re-opened the risk of a similar misperception by referring to *Gallagher v The Queen*,²⁵ in this way:

In *Gallagher v The Queen*, Mason and Deane JJ said that an appellate court will conclude that the unavailability of new evidence at the time of the trial involved a miscarriage of justice if, and only if, it considers that there is "a significant possibility" that the jury, acting reasonably, would have acquitted the applicant of the charge if the new evidence had been before it in the trial.²⁶

- [64] The risk of misunderstanding opened by that reference to *Gallagher* is that it appears to suggest their Honours were saying the significant possibility test is the usual test for new evidence. However, it is obvious from the passages preceding the sentence to which McMurdo JA appears to have been referring in the judgment of Mason and Deane JJ, that they were referring to the test for fresh evidence. To the extent that a reference to new evidence crept into their nomenclature, it was in the general sense that the fresh evidence was additional to that adduced at trial, not in the sense of its special meaning (i.e. evidence which was either available or constructively available at trial).
- [65] As much was made apparent by Mason CJ's reiteration of the usual test for fresh evidence in the subsequent High Court case of *Mickelberg v The Queen*.²⁷ It was also made apparent elsewhere in *Gallagher*, for example by Gibbs CJ, who wrote:

I have had the advantage of reading the reasons for judgment prepared by Mason and Deane JJ who suggest that the Court of Criminal Appeal will conclude that the unavailability of the fresh evidence at the time of the trial will have involved a miscarriage of justice if the Court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the new evidence had been before it at the trial. I am in substantial agreement with this statement.²⁸

- [66] One can see in that passage that the test of significant possibility was being referred to as the test for fresh evidence and to extent there was a reference to new evidence,

²² [2019] 1 Qd R 172.

²³ (2022) 11 QR 556.

²⁴ (2022) 11 QR 556, [44]-[55].

²⁵ (1986) 160 CLR 392.

²⁶ *R v SDT* (2022) 11 QR 556, [69] (McMurdo JA's cited reference was to Mason and Deane JJ in *Gallagher v The Queen* (1986) 160 CLR 392 at 402).

²⁷ (1989) 167 CLR 259, 273.

²⁸ (1986) 160 CLR 392, 399.

it was not in the sense of its special meaning but rather in the sense it was additional to the evidence led at trial.

- [67] In *SDT*, after referring to what was said by Mason and Deane JJ, McMurdo JA quoted what Gibbs CJ had said,²⁹ so it is unlikely McMurdo JA was intending to suggest that the usual test for new evidence equates with the usual test for fresh evidence. Moreover, as is discussed further below, *SDT* was an exceptional case, effectively invoking the residual discretion. *SDT* should not be understood as supporting the view the test of significant possibility is the usual relevant test of miscarriage in respect of new evidence.
- [68] The appellant highlighted two other cases since *SDT* as supporting his submission.
- [69] In the first of those cases, *R v BEP*,³⁰ the reference to the significant possibility test was, as in *HBR*, in reference to the potential exercise of the residual discretion.
- [70] The second of the recent cases cited by the appellant, *R v BEY*,³¹ contained a brief two sentence passage, referring to the law regarding the absence of new evidence as a potential miscarriage of justice. It referred to a requirement that the appellant show the conclusion of guilt was not reasonably open, citing *R v Davidson*,³² or a requirement there is a ‘reasonable probability’ that the appellant would be acquitted in a retrial based on the new and previously led evidence, citing Boddice J (as his Honour then was) in *R v SDT*.³³ It did not adopt the significant possibility test as the relevant test of miscarriage in respect of new evidence.
- [71] The upshot is that the approach urged by the appellant in this case is not supported by the authorities relied upon. To the extent those authorities support the application of a less stringent than usual test to new evidence it is only where the exceptional circumstances of the case call for the exercise of the residual discretion.
- [72] This raises the question of what kind of exceptional circumstances call for the exercise of the residual discretion where new evidence does not meet the usual test for appellate intervention in respect of new evidence.

What kind of exceptional circumstances call for the exercise of the residual discretion where new evidence does not meet the usual test for appellate intervention?

- [73] The circumstances in which the residual discretion ought to be exercised in respect of new evidence which fails the usual test for new evidence, is logically informed by the reason why its exercise should be exceptional. That reason is well illustrated in these observations by Mason J *Lawless v The Queen*:³⁴

[I]t is not permissible for a court of criminal appeal to set aside a conviction if the newly adduced evidence, not being fresh evidence strictly so called, reveals no more than a likelihood that the jury would have returned a verdict of not guilty. Two considerations operate to bring about this result. The first is that in a criminal trial the accused

²⁹ *R v SDT* (2022) 11 QR 556, [70].

³⁰ [2025] QCA 91, [72].

³¹ [2025] QCA 254, [11].

³² [2014] QCA 348, [34].

³³ (2022) 11 QR 556, [85].

³⁴ (1979) 142 CLR 659, 675-676.

is entitled to decide how his case will be conducted, in particular, what evidence he will call. He makes this decision in the light of the knowledge that he has tried but once, unless error or miscarriage of justice results in a successful appeal. He cannot therefore conduct his defence by keeping certain evidence back in the expectation that, if he is convicted, the existence of the uncalled evidence will provide a ground for a second trial at which a different or refurbished defence may be presented. Accordingly, an accused person, if convicted, generally cannot complain of a miscarriage of justice if he deliberately chooses not to call material evidence, it being actually available to him at the time of the trial, or if he fails to exercise reasonable diligence in seeking out material evidence.

The second consideration is that there must be powerful reasons for disturbing a conviction obtained after a trial which has been regularly conducted. No such reason for disturbing a conviction presents itself if all that emerges is that the accused has deliberately chosen not to call evidence or that he has failed to search out evidence with reasonable diligence, unless the evidence not called at the trial demonstrates that the accused should not have been convicted of the offence charged. If the evidence newly adduced falls short of establishing that the accused should not have been convicted, there is no overwhelming reason why the conviction, regularly obtained after a fair trial should not be allowed to stand. (emphasis added)

- [74] The reason why the exercise of residual discretion should be exceptional in respect of new evidence is that the appellant already had a fair opportunity, at a regularly conducted trial, to exercise reasonable diligence and adduce the evidence in question but chose a different path. It logically follows that to justify the potential exercise of the residual discretion, there will ordinarily need to have been some irregularity or other concerning feature in connection with the absence of the new evidence which takes the case beyond the unconcerning circumstance that the defence made a strategic choice not to seek out and adduce the new evidence at a regularly conducted trial below. If there is not, then there cannot have been a miscarriage of justice. If there is, it of course remains to determine whether there has been a miscarriage of justice.

- [75] This approach accords with the recent reasoning of the High Court in *Brawn v The King*.³⁵ The court there observed:

A common circumstance relied on as giving rise to a miscarriage of justice is that there was an error or irregularity in the trial at which the appellant was convicted; that is, some defect in the trial such as a departure from the rules of evidence or procedure, improper cross-examination by a crown prosecutor or a misstatement of fact by the trial judge in the summing up. If such an error or irregularity was “fundamental” in the sense discussed in the authorities then there will be a miscarriage of justice and no occasion to address the proviso separately will arise. The establishment of a fundamental error or irregularity will necessarily mean that there was a substantial miscarriage of justice.

³⁵ (2025) 99 ALJR 872.

For other errors or irregularities to constitute a miscarriage of justice, they must be material in the sense that the error or irregularity could realistically have affected the reasoning of the jury to a verdict of guilty that was returned by the jury in the criminal trial that occurred.³⁶

- [76] The Court described meeting the latter test, which, as already explained, effectively equates to the usual test for fresh evidence, as meeting the materiality threshold. However, the premise of its application is that there first must be some concerning circumstance, such as an error or irregularity in the trial, relied on as potentially giving rise to the alleged miscarriage of justice. The post-trial emergence of fresh evidence, if cogent, is obviously such a circumstance. The absence at trial of new evidence is not. That is because its absence was merely the product of a strategic choice not to seek out and deploy the evidence at a fair trial below. That is why, to enliven the residual discretion, there will ordinarily need to be some irregularity or other concerning circumstance in connection with the absence of the new evidence, beyond the mere fact a defendant made the choice not to seek out and adduce it, as it could have been, at a regularly conducted trial.
- [77] *R v Daley; ex parte A-G (Qld)*,³⁷ provides an example of such a circumstance invoking the exercise of the residual discretion. There the additional evidence was that a post-trial police examination of pellets said to have been shot in committing the offence of unlawfully killing an animal, showed they were likely never discharged. At trial police had testified that enquiries with their ballistics section had been of no assistance. Keane JA, with whom Williams JA and Muir J agreed, considered the evidence was new, rather than fresh. However, his Honour considered the new evidence was evidence which would usually be expected to be available and led by the prosecution and the failure of the prosecution to adduce it ‘was a flaw in the conduct of the trial which had nothing to do with the competence of Mr Daley’s defence’. It was that concerning irregularity in the conduct of the case which resulted in a conclusion of miscarriage and the conviction being set aside.³⁸
- [78] Another example of an irregularity or other concerning circumstance demonstrating a miscarriage of justice in connection with new evidence is provided by *R v SDT*.³⁹ That case involved charges based on allegations the appellant had mistreated and been neglectful in the care of his daughter. Yet the new evidence, from two medical practitioners, showed the appellant had frequently taken his daughter to doctors, contrary to the allegation he was neglectful, and that his daughter had mental health difficulties causing her to have behavioural problems which would be challenging for a parent to manage. This was new evidence in that it was known to the appellant, indeed it had been disclosed by the prosecution. The exceptional, irregular feature of the case was that the appellant had instructed that the two doctors be called by the defence and those instructions were disregarded, indeed his solicitor did not even brief his counsel with the evidence. In concluding there had been a miscarriage of justice, McMurdo JA found the appellant was not in any way responsible for the evidence not being tendered and that on an objective view there had been no rational explanation for doing so.⁴⁰

³⁶ Ibid 876, [9]-[10].

³⁷ [2005] QCA 162.

³⁸ This was in the context of a pardoning power referral per s 672A *Criminal Code* (Qld) but that section provides such referrals are decided as in the case of appeals.

³⁹ (2022) 11 QR 556.

⁴⁰ Ibid [73].

- [79] *SDT* was like those cases involving miscarriages of justice said to arise from flagrant incompetence of counsel in not adducing particular evidence. In both fresh evidence cases and incompetence of counsel cases the absence of evidence compromises the fairness of the trial.⁴¹ In fresh evidence cases the unfairness derives from the concerning circumstance that the material evidence was not known of, and could not with reasonable diligence have been known of, at the time of trial. In incompetence of counsel cases the unfairness derives from the concerning circumstance that the appellant was represented by counsel so incompetent that there is no objectively reasonable explanation why evidence known of, or which with reasonable diligence should have been known of, at the time of trial was not adduced.

Was there any irregularity in connection with the absence of the new evidence in this case?

- [80] The above analysis makes it clear that the less stringent than usual test which the appellant urges this court to invoke in respect of the new evidence is only apt where the exceptional circumstances of the case make it apt to invoke the residual discretion. In the context of the present case, where the trial below was conducted without legal error, it would only be apt if there has been some irregularity or other concerning circumstance in connection with the absence of the new evidence which takes the case beyond the unconcerning circumstance that the appellant made the choice not to seek out and adduce the new evidence at a regularly conducted trial below.
- [81] There was no such irregularity or concerning circumstance. To explain why, it is necessary to enlarge upon the content of the grandmother's 'new evidence', beyond the additional fact on which the appellant focusses.
- [82] The affidavit of the appellant's grandmother, relied upon in the appeal, deposed that on the night of the alleged offending her husband, the appellant, was 'sleeping downstairs because of his cancer'. She deposed MJ had asked to sleep down there with the appellant, on a mattress on the floor, because the appellant had been feeling unwell due to his cancer treatment. She deposed that MJ spent the ensuing day with her and then continued:
9. That night [MJ] came upstairs and slept with me and [KA] in a king-sized bed.
 10. I reached over and gave [MJ] a hug and he was crying. I asked him what was wrong. He told me he had a headache and an upset tummy, due to eating too much food for dinner. He also told me that Pop had touched his bum. I gave him a big cuddle and asked him if he was sure. He did not answer me.
 11. So, I went downstairs to the spare bedroom on the second level and asked [the appellant] about it. [The appellant] was initially surprised and then shocked and upset that I was questioning him about it, that he had possibly upset [MJ].
 12. [The appellant] told me that:
 - (a) He went to the toilet.
 - (b) When he came back, he saw [MJ's] pants were down and [MJ] was hunched up on the mattress.

⁴¹ A common feature identified by Hayne J in *TKWJ v The Queen* (2002) 212 CLR 124, 159-160 [112].

(c) So, he leant down and pulled them up, and being half asleep and with [MJ's] shorts being very tight, he might have been a little rough and accidentally touched [MJ's] bum.

13. I told [the appellant] to come upstairs with me and say sorry to [MJ] for upsetting him.

14. [The appellant] came up with me to where [MJ] was and said "Hey mate, I'm sorry if I accidentally touched your bum. I was only pulling up your pants".

15. [MJ] said, "It's ok Pop. I know that's all you were doing".
(emphasis added)

[83] The above emphasised response is the additional fact to which the appellant attaches particular importance in advancing the present ground. It is not a fact which the grandmother expressly asserted to police when they came to her house on 21 August 2021 (three days after the police interview of MJ) and conversed with her, apparently recording the conversation. The conversation they had with her evidently gave rise to a transcript, the pages of which the grandmother referred to in deposing to what she said in her conversation with the police when they came to her house.

[84] The grandmother deposed that when the police asked her what it was MJ had told her happened, she said:

He said that um, 'cause when he come upstairs and he was crying, he said I've got a upset stomach. He said Pop touched my bum. ...

And I said what do you mean? And I went off. I called [the appellant]. I was screaming at him. ...

Poor ol' [MJ]. I shouldn't have but I, you know, as a female, you go what is going on here. And [MJ] is going on no Nan um, he just touched my bum. And I said [appellant], what did you do?

[85] The grandmother deposed to having told police she had heard from [MJ] that the appellant was pulling up his pants, although the account which she proceeded to then quote did not put it that way. She deposed to telling police:

Apparently, [the appellant] went up and got, went to the toilet. ... And he saw [MJ's] bum. ... So, he put his hand in to pull his pants up. ...

And he said, 'cause I went right off. I said, excuse the French, what the fuck were you thinking. ... Why didn't you come and get me? ... And he said well, I probably went like that when I pulled his pants up. ...

I have known [the appellant], I've been with him thirty years. I have never known him to do anything like that. Never. ... So, I'm thinking, and what I've been told and what I heard from [MJ], everybody, that's what happened.

[86] Four points about that evidence are sufficient to simultaneously explain why an allegation of flagrant incompetence by defence counsel was not made and could not have succeeded and why there is no irregularity associated with the absence of the new evidence at trial.

- [87] Firstly, in the grandmother's conversation with police, she made no express mention of the additional fact now asserted by her. Had the grandmother been called as a witness by the defence, it is inevitable the Crown Prosecutor would have elicited in cross-examination that the grandmother made no express mention when she was speaking with the police of the obviously important exculpatory fact that MJ had acknowledged knowing all the appellant had done was pulled up his pants. Such an inconsistency would likely have resulted in the jury regarding her claim about MJ's acknowledgement as unreliable.
- [88] Secondly, when MJ was cross-examined by the appellant's counsel, it was specifically put to him, obviously on instruction, that all the appellant had done was pull MJ's pants up. However, it was not put to MJ that, when speaking to the appellant and his grandmother the following evening, he had admitted knowing that was all the appellant had done. That the occurrence of the additional fact had not been put, in circumstances where, if it happened, the appellant would have known of it, would also have tended to undermine the reliability of the grandmother's evidence of that additional fact in the eyes of the jury.
- [89] Thirdly, even if the grandmother's evidence was believed, the jury would have been very unlikely to think MJ's alleged response – 'It's ok Pop. I know that's all you were doing' – was a genuine acceptance that in fact the appellant had not deliberately interfered with MJ's anus. After all, MJ was an upset child and the adult appellant, his Pop, in the presence of another adult, his Nan, was specifically asserting it had all been an accident. The prospect of an upset child acquiescing to, rather than arguing about, the assertion of the adult in that relationship dynamic would inevitably result in the jury attaching no material weight to the child's response. In other words, even if the allegedly important fact which the grandmother's evidence could have placed before the jury was regarded as reliable, its context meant it would not have materially advanced the defendant's prospects.
- [90] Fourthly, the grandmother's evidence confirms not only that MJ did make a timely complaint about the appellant having touched his backside the evening after the alleged offending, but that he was also crying when he told her about it. These facts would have been helpful to the prosecution case, not the defence case. The inference is compelling that the fact of MJ's crying was related to the fact of how the appellant had touched him during the previous night. It is inherently unlikely he would have been crying if he believed the touching had been a merely accidental touching when pulling up his pants. The fact the grandmother observed he was crying would, if known by the jury, have harmed the appellant's prospects because it fortifies the inference of consistency in MJ's conduct with him having been offended against as alleged. Indeed, it was so close in time to the offending that, in a previous era when corroboration was more critical in such prosecutions, it may arguably have been categorised as evidence of distressed condition.⁴²
- [91] Those points demonstrate the defence was unlikely to be advantaged and likely to be disadvantaged by calling the grandmother to prove the additional fact. Her evidence would have bolstered the evidence of MJ's consistency of conduct. It would not only have confirmed his evidence that he made a timely complaint to his grandmother about the appellant having touched his backside. It would also have revealed MJ was crying when he did so.

⁴² For example, see *R v Roissetter* [1984] 1 Qd R 477.

- [92] Those points make it unsurprising an allegation of incompetence of defence counsel is not pursued. Indeed, there was no affidavit from the appellant, let alone one suggesting that he had forgotten the additional fact or that the choice not to call his wife as a witness was contrary to his instructions.
- [93] To illustrate just how hollow the claim of miscarriage is here: if this court were to intervene and order a re-trial on account of the new evidence, could it seriously be thought the defence would be likely to call the grandmother as a witness at a re-trial? The combined force of the first, third and fourth points above suggests to the contrary.
- [94] The choice not to call the grandmother in the defence case, with the consequence the additional fact was not before the jury, was an unremarkable example of the decisions regularly made in the course of defending an accused person in pursuit of the goal of giving the accused the best chance of being acquitted. There was no irregularity or other concerning circumstance in connection with the absence of the new evidence. The so-called residual discretion is not enlivened.

There was no miscarriage

- [95] The new evidence does not meet the usual stringent test for new evidence. The appellant had fair opportunity to have called his wife in his defence at a regularly conducted trial but chose not to do so in circumstances where there were objectively sound forensic reasons for not calling her.
- [96] There was no miscarriage of justice.
- [97] The application for leave to adduce the additional evidence should be refused.

Were the verdicts in respect of counts 1 to 3 unreasonable or not supported because KA's evidence was inadequately detailed to support the counts?

- [98] At the hearing, the remaining ground started out as a complaint of a miscarriage of justice because the particulars were not sufficiently clear. It morphed into a complaint of unreasonable verdicts after it began to appear the particulars likely provided enough detail and likely avoided risk of duplicity. The real complaint was that the evidentiary content of the complainant's interview with police, exhibited as part of her evidence at trial, was too confused to support the alleged particulars. Leave was given to amend the ground and for further submissions to be made in writing in connection with this ground.
- [99] The amended ground, ground 2 in the appeal, is:
- The verdicts on Counts 1 to 3 are unreasonable and cannot be supported having regard to the evidence, in that the complainant's evidence did not identify objectively distinguishable occasions corresponding to each Count.⁴³
- [100] Despite the amendment of the ground in the face of it being apparent the particulars provided enough detail and likely avoided risk of duplicity, the appellant's supplementary submissions still invoked reliance upon principles pertinent to a complaint of inadequate particularity. It is therefore relevant to explain that this is a case in which particulars were provided. It is not a case like *S v The Queen*,⁴⁴ where

⁴³ Ground 2 in the appeal.

⁴⁴ (1989) 168 CLR 266.

the trial of the defendant was found by the majority of the High Court to have been fundamentally flawed because the trial judge declined to order the provision of particulars in respect of the three charged offences of unlawful carnal knowledge. The evidence there disclosed a greater number of such offences, any one of which could have fallen within the description of each count, the result being latent ambiguity as to which act attracted a particular charge.

[101] It is also relevant to explain that the particulars were provided in advance of the pre-recording of KA's evidence,⁴⁵ the appellant's counsel cross-examined her with knowledge of those particulars and no complaint was made by trial counsel about the particulars or their adequacy then or at the ensuing trial.

[102] In *The Queen v R*,⁴⁶ Dowsett J observed:

[T]he ultimate question will be whether the particulars are reasonably sufficient for the purposes of the administration of justice and for the accused to make a proper defence. The less satisfactory the particulars, the more important will be an adequate direction as to the difficulties created for the accused in answering the charges and the need for care in scrutinizing the Crown case. As with so many other aspects of a criminal trial, the adequacy of particulars is very much a matter of judgment. (emphasis added)

[103] Bearing in mind the adequacy of particulars involves an assessment of degree it is telling that defence counsel below apparently assessed the particulars as adequate for the purposes of identifying, and defending the appellant in respect of, the allegations in KA's evidence identified as constituting the charged offences. The defence case, at least as put to and rejected by KA, was that all her allegations of the appellant's sexual misconduct towards her were lies. This was not a case where greater particularity may have been needed to defend the charges, for example because it was relevant to a real prospect that the appellant had an alibi or some other fact potentially showing the alleged offences could not have occurred as alleged.

[104] This all explains why the ground, initially framed as alleging a miscarriage of justice, was doomed to fail.

[105] The argument now advanced by the appellant is that it was not open for the jury to conclude that each of counts 1, 2 and 3 'was referable to one identifiable transaction distinguishable from other similar incidents suggested by the evidence'. This argument draws upon the observation of Dowsett J in *The Queen v R* that:

In general, as a minimum requirement, it is necessary that there be sufficient particularity in the allegations to demonstrate one identifiable transaction which meets the description of the offence charged, distinguishable from any other similar incidents suggested by the evidence. I cannot see how there can be a trial in the absence of that degree of particularity. Of course, this requirement does not exclude multiple charges of substantially similar events, provided the

⁴⁵ The particulars at the pre-record (AR vol 2 p 192) were effectively identical to the particulars at the ensuing trial (AR vol 2 p 250) save for the particulars at the pre-record including, of the allegation of touching of the pubic area in counts 1 and 2, that the touching was under KA's underpants – an allegation that was supported by the content of KA's evidence.

⁴⁶ [1998] QCA 83.

evidence demonstrates separate, identifiable transactions which can be related to counts in the indictment.⁴⁷ (emphasis added)

- [106] The revised argument is advanced in support of a ground which, as earlier explained, requires an assessment of the sufficiency and quality of the whole of the evidence, to determine whether it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of counts 1, 2 and 3.⁴⁸
- [107] These reasons have already assessed the evidence pertaining to MJ's complaints, evidence which was open to the jury to accept, and which was cross-admissible in support of counts 1, 2 and 3. Turning to KA's complaints, they emerged about a month and a-half after MJ's interview with the police. The mother testified she was speaking with her children about why they could not go to the home of their grandmother and the appellant anymore and speaking with them about child safety. During that conversation KA, who was only eight years old, said, 'I want to tell you something'. But when her mother asked, 'What is it you want to tell me?' KA said, 'I can't. I'm really embarrassed'. Her brother MJ then suggested, 'You can write it down and show Mum'. She then wrote the following on a sheet of paper, which was exhibited at trial: 'he totcht me'.
- [108] Her mother then told KA she needed to tell her what happened and her brother reassured her, saying it was okay and she would not get into trouble. With that, KA then demonstrated by grabbing MJ's hand and putting it on her crotch. KA went on to say 'Poppy made me touch it'. When her mother responded, 'What? His dick?' KA answered, 'Yes'.
- [109] That disclosure resulted in the police again being contacted and KA was interviewed by them. KA was obviously reluctant in the course of the interview to be speaking with the police, reluctance which extended to not wanting to use the names of private body parts.
- [110] Like her brother, the way KA's disclosure emerged and was elaborated upon in the police interview, had the credible hallmarks of a child who was reluctantly describing the reality of what her step-grandfather had done to her. It was open to the jury to regard her allegations of the appellant's sexual misconduct towards her as truthful.
- [111] KA explained early in the interview that her 'Step-Pop ... touched me in the wrong way' and would 'show his private parts' and that he 'grabbed my arm and made me touch it'. By the conclusion of the interview KA had explained there were about four occasions of sexual touching, all of which occurred when she was staying over at the home of her grandmother and the appellant, at a time when she and the appellant would be in the lounge room alone and her brother and grandmother would be elsewhere in the house. In each instance the appellant had been sitting on his rocking chair and had instructed her to come over to him and sit beside him on the area of its armrest.
- [112] The nub of the appellant's argument is that KA's evidence, per the police interview, was so 'vague, imprecise and changeable' that her differentiation between the occasions referred to was 'non-existent'. In support of that argument the appellant's counsel juxtaposed various passages in the interview. Those passages are objectively

⁴⁷ [1998] QCA 83.

⁴⁸ *M v The Queen* (1994) 181 CLR 487.

open to being regarded as uncertain and inconsistent about what occasion was being spoken of. However, the appellant's argument must fail because there is a competing view of the interview, which was open to the jury. That view was that, assessing the interview as a whole, despite some literal uncertainty and inconsistency in parts of her account, KA did refer, in respect of each of the occasions relied upon in support of the charged counts, to one identifiable transaction distinguishable from other similar incidents suggested by the evidence.

- [113] The prosecution selected the two most specifically described occasions of sexual touching to charge. Its particulars of the occasion charged in count 1 were:

[The appellant] touched [KA's] pubic area.

This happened at a time when [the appellant's wife] was occupied with [MJ].

- [114] The other charged occasion attracted counts 2 and 3. The particulars of count 2 were:

[The appellant] touched [KA's] pubic area.

This occurred on the same occasion as count 3.

- [115] The particulars of count 3 were:

[The appellant] moved [KA's] hand to touch his penis.

This occurred on the same occasion as count 2.

- [116] In KA's police interview, when the police first pressed for some greater detail about the touchings, KA described the occasion which was to later attract counts 2 and 3 on the indictment. She explained:

My nan was upstairs having a shower, [MJ] was playing video games.
... And she didn't bother taking me upstairs and so he told me to come over and then that's when it happened.

- [117] She confirmed they were in the living room where the TV was, explaining the news was on and she was watching her iPad. She explained the sexual touchings that occurred on that occasion stopped when her Nan was coming, walking in the hallway, and he told her to get off. Of the sexual touching on this occasion she explained his private part was out and he 'grabbed my hand and made me do it'. When later asked for elaboration, she said:

'Like, he pulled out his private parts and then he said, "touch it."
I said, no. So he grabbed my wrist and made me.'

- [118] This was the only description KA gave of an occasion when the appellant had her touch his penis, whereas she explained he had touched her private parts on repeat occasions. In her pre-recorded evidence she confirmed he had touched her private parts four to five times, but had only forced her to touch his penis on the one time which she testified 'was the last time that it happened'.

- [119] As to count 1, another occasion when the appellant touched outside KA's vagina, the particulars distinguished this occasion from other times when there was such a touching by reference to it happening at a time when the grandmother was occupied with MJ. This matched KA having told the police of there having been multiple occasions when the appellant touched her in the pubic area and recalling that on one of those occasions:

Nan wasn't upstairs. She was helping [MJ] with something, downloading a video game.

- [120] The effect of KA's interview with the police, taken as a whole, was that on the occasion when her grandmother had been upstairs having a shower and her brother was playing video games and the appellant made her touch his penis, he had also touched outside her vagina. Further, its effect was that was the only occasion when he made her touch his penis. This was therefore an identifiable transaction involving the two offences alleged as constituting counts 2 and 3.
- [121] Further, the effect of KA's interview with the police, taken as a whole, was that one of the other occasions when the appellant touched outside her vagina occurred at a time when her grandmother was helping [MJ]. This was therefore an identifiable transaction involving the offence alleged as constituting count 1.
- [122] It was open to the jury to conclude, contrary to the appellant's argument, that KA's evidence was capable of identifying discrete occasions of offending as alleged by counts 1, 2 and 3 and their particulars. Those counts were therefore supported by the evidence. Bearing in mind it was also open to the jury to regard KA's complaints of the appellant's sexual misconduct towards her as reliable, and that MJ's evidence supported the reliability of her complaints, it follows that on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of counts 1, 2 and 3. This ground must therefore also fail.

Orders

- [123] All grounds of appeal having been unsuccessful the orders should be:
1. Application for leave to adduce evidence refused.
 2. Appeal dismissed.